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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

HB PARK, LLC, Plaintiff and Appellant, v. SPECIALIZED LOAN SERVICING, LLC, et al., Defendants and Respondents.	G056419 (Super. Ct. No. 30-2017-00896171) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Peter J. Wilson, Judge. Affirmed.

Imperial Law Group and James T. Imperiale for Plaintiff and Appellant.

The Ryan Firm, Timothy M. Ryan and Tadeusz McMahon for Defendants and Respondents Specialized Loan Servicing, LLC and the Bank of New York Mellon.

Anderson, McPharlin & Conners and William R. Larr for Defendant Rocky DeFrancis.

* * *

In this postforeclosure action, plaintiff HB Park, LLC (HB Park) appeals from a judgment of dismissal following an order sustaining a demurrer to its second amended complaint without leave to amend. We affirm. We conclude HB Park failed to allege facts sufficient to show standing and further failed to show it could overcome that deficiency if given yet another opportunity to amend its complaint. We also reject HB Park's argument the trial court violated its due process rights by sustaining the demurrer.

I.

FACTS

"For purposes of reviewing a demurrer, we accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law." (*Yvanova v. New Century Mortgage Corp*. (2016) 62 Cal.4th 919, 924 (*Yvanova*).) We also accept as true "the contents of any exhibits attached to the complaint, and in the event of a conflict between the pleading and an exhibit, the facts contained in the exhibit take precedence over and supersede any inconsistent or contrary allegations in the pleading." (*Jibilian v. Franchise Tax Bd.* (2006) 136 Cal.App.4th 862, 864, fn. 1.) Subject to these principles, the underlying facts are taken from the operative second amended complaint and the attached exhibits.

In 2004, nonparty Michael Younessi purchased a house in Huntington Beach (the property). In 2006, Younessi obtained an adjustable rate loan for $1,218,000 from Countrywide Home Loans, Inc. (Countrywide), and he secured the loan with the property through a deed of trust.

The deed of trust identified Younessi as the borrower, the lender as Countrywide, the trustee as Recontrust Company, NA (Recontrust), and Mortgage Electronic Registration Systems, Inc. (MERS)[1] as the lender's nominee and the deed of

[1] MERS "was formed by a consortium of residential mortgage lenders and investors to streamline the transfer of mortgage loans and thereby facilitate their securitization."

trust's beneficiary. The deed of trust stated it could "be sold one or more times without prior notice to Borrower." It also stated the lender could "appoint a successor trustee."

In late 2010, MERS executed an assignment of the deed of trust to defendant The Bank of New York Mellon fka the Bank of New York, as Trustee for the Certificateholders of the CWALT, Inc., Alternative Loan Trust 2006-OA10 (BNY Mellon). The assignment was notarized and later recorded in May 2011. In June 2011, MERS executed a *second* assignment of the deed of trust to BNY Mellon. That second assignment was notarized and later recorded in July 2011.[2] Both instruments reflect an assignment of the deed of trust from MERS to BNY Mellon.

In September 2011, BNY Mellon issued and recorded a notice of default stating Younessi was delinquent in the amount of $199,471.13 on the loan secured by the deed of trust. A week later, Younessi executed and recorded a quitclaim deed on the property, transferring title in the property to HB Park.

In 2014, BNY Mellon executed and recorded a substitution of trustee, substituting defendant MTC Financial Inc. dba Trustee Corps (MTC) as the new trustee of the deed of trust in lieu of Recontrust.

In 2016, MTC issued and recorded a notice of trustee's sale stating the loan Younessi secured with the deed of trust was in default, the estimated unpaid balance was $1,862,111.06, and the property would be sold at a public sale to the highest bidder. Defendant P Assets Inc. (P Assets) bought the property at the trustee's sale. About a month later, P Assets sold the property to defendant Rocky De Francis.

(*Yvanova, supra*, 62 Cal.4th at p. 931, fn. 7.) "'Under the MERS System, . . . MERS is designated as the beneficiary in deeds of trust, acting as "nominee" for the lender, and granted the authority to exercise legal rights of the lender.'" (*Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 816, fn. 6 (*Saterbak*).)

[2] HB Park alleges the second assignment was not notarized, but the exhibit attached to its complaint belies that allegation.

HB Park filed a complaint against BNY Mellon, MTC, defendant Specialized Loan Servicing, LLC (SLS), and P Assets for quiet title, cancellation of instruments, slander of title, and negligence. HB Park alleged the two assignments of the deed of trust from MERS to BNY Mellon were "void" for reasons we explain below, and MTC thus lacked the ability to foreclose on the property.

SLS and BNY Mellon filed a demurrer to the complaint, arguing, among other contentions, that HB Park lacked standing to challenge MERS's assignments of the deed of trust. Rather than filing an opposition, HB Park filed a first amended complaint, which was identical to its original complaint except that it added DeFrancis as a defendant. SLS and BNY Mellon again demurred, and the trial court sustained their demurrer with leave to amend. The court found HB Park failed to allege facts demonstrating standing to bring each cause of action.

HB Park filed a second amended complaint, which was identical to its first amended complaint except that it added a fifth cause of action for wrongful foreclosure. This new cause of action raised two new theories to challenge the validity of the trustee's sale: (1) MERS was allegedly not registered with the California Secretary of State to conduct business when the deed of trust was signed in 2006,[3] and (2) the person who notarized MERS's first assignment to BNY Mellon "failed to turn in his notary journals into Los Angeles Recorder's Office as required under Government Code section 8209(a)."

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[3] This allegation does not seem to help HB Park. Although a foreign corporation generally may not conduct intrastate business without first obtaining a certificate of qualification from the Secretary of State (Corp. Code, § 2105, subd. (a)), a foreign corporation does not conduct intrastate business by "[c]reating evidences of debt or mortgages, liens or security interests on real or personal property" or by engaging in activities necessary for "[t]he ownership of any loans and the enforcement of any loans by trustee's sale, judicial process or deed in lieu of foreclosure or otherwise." (Corp. Code, § 191, subds. (c)(7), (d)(3), (d)(7).)

SLS, BNY Mellon, and DeFrancis filed demurrers, which the trial court sustained, this time *without* leave to amend. Among other conclusions, the court found HB Park again had failed to allege facts demonstrating standing to bring each cause of action. In denying HB Park leave to amend, the court noted HB Park's "second amended complaint . . . left entirely untouched the first through fourth causes of action (as to each of which the court had previously sustained defendants' demurrers)," HB Park's new cause of action for wrongful foreclosure was equally inadequate, and HB Park "fails to suggest any additional facts [it] can proffer to state valid causes of action."

The trial court entered judgments of dismissal with prejudice as to SLS, BNY Mellon, and DeFrancis. HB Park appealed from the judgment of dismissal of SLS and BNY Mellon.

II.

DISCUSSION

A. *Standard of Review and HB Park's Burden on Appeal*

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. [Citations.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse. [Citation.]" (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.)

"When the trial court sustains a demurrer, we review the complaint de novo to determine whether it alleges facts stating a cause of action on any possible legal

theory." (*Rossberg v. Bank of America* (2013) 219 Cal.App.4th 1481, 1490 (*Rossberg*).) "Nonetheless, '[t]he plaintiff has the burden of . . . overcoming all of the legal grounds on which the trial court sustained the demurrer . . . . We will affirm if there is any ground on which the demurrer can properly be sustained . . . .'" (*Id.* at pp. 1490-1491.)

B. *HB's Park's Failure to Comply with the Rules of Court*

Before turning to the merits, we note HB Park's appellate briefs are no model of clarity and do not comply with the California Rules of Court. For example, HB Park's opening brief fails to "[s]tate each point under a separate heading or subheading summarizing the point." (Cal. Rules of Court, rule 8.204(a)(1)(B).) With the exception of the opening brief's headings referencing due process and perhaps the heading impliedly referencing *Yvanova*, HB Park did not comply with this rule.[4] We may disregard all arguments not properly segregated under appropriate discrete headings. (*Dinslage v. City & County of San Francisco* (2016) 5 Cal.App.5th 368, 378, fn. 3 ["'[a]lthough we address the issues raised in the headings, we do not consider all of the loose and disparate arguments that are not clearly set out in a heading and supported by reasoned legal argument'"]; *Consolidated Irrigation Dist. v. City of Selma* (2012) 204 Cal.App.4th 187, 201 [appellant "forfeited the argument by violating the rule that requires each point be presented in an appellate brief under a separate heading"].)[5]

HB Park's reply brief is also deficient. It improperly refers to matters outside the record, such as alleged transactions and communications with DeFrancis, BNY Mellon, and MTC. "Matters that are not part of the appellate record will not be

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[4] The headings in the argument section of HB Park's opening brief are simply: "ARGUMENT," "STANDARD OF REVIEW," "ARGUMENT FOR RELIEF," "RECENT SUPREME COURT CASE GUIDES COURT" (referencing *Yvanova*), and three detailed headings regarding due process.

[5] HB Park's briefs also contain a myriad of grammatical, formatting, and typographical errors.

considered on appeal and such matters should not be referred to in the briefs." (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 102.) HB Park's reply brief also raises some new arguments that, as best we can tell, were not previously asserted in its opening brief. "We deem the arguments made for the first time in the reply brief to be waived." (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 799.)

C. *HB Park Failed to Allege Facts Demonstrating Standing*

Turning to the merits of HB Park's appeal, HB Park bases its second amended complaint on the notion that MERS's "forged" assignments of the deed of trust to BNY Mellon rendered the chain of title in the deed of trust "void," and therefore the subsequent foreclosure was unlawful. To establish the assignments were "void," HB Park alleges the MERS officer who signed the first assignment was not a representative of MERS and lacked the capacity to execute the assignment; the alleged notarization of the first assignment was a robo-signed signature or forgery; the "forged" assignment created a void chain of title; and any subsequent documents were void *ab initio*. HB Park further alleges MERS executed the second assignment in an attempt to conceal the "forgery" of the first assignment, the second assignment was invalid because any interest MERS had was transferred by the first assignment, and the MERS employee who executed the second assignment lacked authority to do so.

We must determine whether HB Park's second amended complaint alleges facts sufficient to constitute a cause of action. Standing is a threshold issue necessary to maintain the existence of a cause of action, and the plaintiff bears the burden to allege and establish standing. (*Saterbak, supra,* 245 Cal.App.4th at pp. 813-814.) In the wrongful foreclosure context, a borrower has standing to challenge an assignment that is void, but lacks standing to challenge an assignment that is merely voidable. (*Yvanova, supra,* 62 Cal.4th at p. 939-940 ["borrowers have standing to challenge assignments as

void, but not as voidable"].) Lack of standing supports a general demurrer for failure to state a cause of action. (*County of Fresno v. Shelton* (1998) 66 Cal.App.4th 996, 1009.)

As we explain below, the alleged defects in the assignments rendered MERS's assignments to BNY Mellon voidable, not void. We therefore agree with the trial court that HB Park failed to allege facts demonstrating standing to challenge MERS's assignments of the deed of trust to BNY Mellon. HB Park argues it has standing under *Yvanova, supra,* 62 Cal.4th 919, but *Yvanova* actually confirms HB Park *lacks* standing.

In *Yvanova,* our Supreme Court held that a borrower[6] suing to set aside or recover damages for a wrongful foreclosure has standing to assert defects in an assignment of the borrower's note and deed of trust to the foreclosing entity only when the defects render the assignment *void,* rather than merely voidable. (*Yvanova, supra,* 62 Cal.4th at p. 939.) The court explained a contract is void if it is without legal effect; void contracts are not binding, but a "'mere nullity,'" and cannot be validated by any party. (*Id.* at p. 929.) By comparison, a contract is voidable if "'one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance.' [Citation.] It may be declared void but is not void in itself. [Citation.] Despite its defects, a voidable transaction, unlike a void one, is subject to ratification by the parties." (*Id*. at p. 930.)

In distinguishing between void and voidable assignments, the *Yvanova* court reasoned "California law does not give a party personal standing to assert rights or interests belonging solely to others." (*Yvanova, supra,* 62 Cal.4th at p. 936.) Allowing a borrower to challenge a *voidable* assignment would let the borrower, a nonparty to the

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[6] Although HB Park was not the borrower on the loan, HB Park claims to stand in the borrower's (Younessi's) shoes. We need not reach the merits of this contention because even if HB Park could do so, it lacks standing for the reasons stated below.

assignment, decide whether the assignment should be extinguished rather than ratified. In contrast, allowing a borrower to challenge a *void* assignment simply allows the borrower to assert the unavoidable legal consequence of the void assignment. The parties to a void assignment can do nothing to validate it, so a borrower challenging a void assignment is not asserting any rights belonging to those parties when he or she seeks to invalidate the assignment, but rather is asserting his or her own right to have a foreclosure conducted solely at the direction of the current holder of the note and deed of trust. (*Id.* at pp. 935-937.)

Because a borrower's standing to challenge an assignment turns on whether the assignment is void or merely voidable, we must determine whether HB Park has alleged facts demonstrating the MERS assignments to BNY Mellon were void. We disregard HB Park's allegations the assignments were "forged" and "void" because they are legal conclusions. (*Yvanova, supra*, 62 Cal.4th at p. 924; *Yhudai v. IMPAC Funding Corp*. (2016) 1 Cal.App.5th 1252, 1257.) Instead, we examine the basis for HB Park's allegations.

According to HB Park's second amended complaint, the MERS officer who signed MERS's first assignment to BNY Mellon was not a MERS representative and lacked the capacity to execute the assignment, and the alleged notarization was a robo-signed signature or forgery. HB Park further alleges MERS executed the second assignment in an attempt to conceal the "forgery" of the first assignment, and the MERS employee who executed the second assignment lacked authority to do so.

These allegations, if true, fail to show MERS's assignments to BNY Mellon were "void," as HB Park claims. Even if the MERS representatives lacked authority to execute the assignments, MERS still could ratify the assignments. (*Navrides v. Zurich Ins. Co.* (1971) 5 Cal.3d 698, 703-704 [principal may ratify agent's unauthorized act]; see *Yvanova, supra*, 62 Cal.4th at p. 930 [contract is voidable if party may choose to either "'avoid the legal relations created by the contract, or by ratification

of the contract to extinguish the power of avoidance'"].) And if the notarization of the first assignment was robo-signed, that too would render the contract voidable, not void. (*Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 46 [robo-signed notice of default is voidable, not void]; *Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 819 [robo-signed assignment is voidable].) The assignments were thus not void *ab initio*, but rather voidable at MERS's option.

Because the alleged defects in the assignments of the deed of trust rendered the assignments voidable, not void, HB Park failed to establish standing to challenge the assignments through its claims for quiet title, cancellation of instruments, slander of title, or wrongful foreclosure. HB Park did not argue the trial court's ruling on its negligence cause of action was incorrect, so we treat the issue as waived. In light of these conclusions, we need not address the many other defects the trial court found in HB Park's claims, such as the lack of alleged tender of the amount owing on the loan.

D. *The Trial Court Did Not Violate HB Park's Due Process Rights*

HB Park argues the trial court, in sustaining the demurrers without leave to amend, denied HB Park its due process rights, its right to discovery, its right to produce evidence, its right to cross-examine witnesses, its right to a fair hearing, and its right to a jury trial. HB Park is wrong.

The California Legislature expressly authorizes a party to challenge a pleading by way of demurrer, and courts may strike a pleading that fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10 et seq.) "A demurrer can be used only to challenge defects that appear on the face of the pleading under attack or from matters outside the pleading that are judicially noticeable. No other extrinsic evidence can be considered." (*Kerivan v. Title Ins. & Trust Co.* (1983) 147 Cal.App.3d 225, 229.) Thus, at least at the demurrer stage, HB Park had no right to present extrinsic evidence or cross-examine witnesses. Moreover, because HB Park

repeatedly failed to allege facts sufficient to constitute a cause of action, it had no right to an *additional* hearing, discovery, or a jury trial after the court sustained the demurrers without leave. HB Park *could* have conducted written discovery and depositions within just days of filing and serving its initial complaint (see Code Civ. Proc., §§ 2025.210, subd. (b), 2030.020, subd. (b), 2031.020, subd. (b), 2033.020, subd. (b)), but there is no indication HB Park did so here.

E. *The Trial Court Did Not Abuse Its Discretion in Denying Leave to Amend*

Finally, HB Park contends the trial court should have granted leave to amend. As the appellant, HB Park "'bears the burden of proving there is a reasonable possibility of amendment. [Citation.] . . . [¶] To satisfy that burden on appeal, [it] "must show in what manner [it] can amend [its] complaint and how that amendment will change the legal effect of [its] pleading." [Citation.] The assertion of an abstract right to amend does not satisfy this burden. [Citation.] The plaintiff must clearly and specifically set forth the "applicable substantive law" [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. [Citations.] Allegations must be factual and specific, not vague or conclusionary. [Citation.]'" (*Rossberg, supra,* 219 Cal.App.4th at p. 1491.)

HB Park had *three* opportunities to plead a sufficient complaint, but it was unable to do so. Further, it has not shown how the second amended complaint could be amended to overcome its deficiencies. The trial court therefore did not abuse its discretion in denying leave to amend.

III.

DISPOSITION

The judgment is affirmed. SLS and BNY Mellon shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) and (2).) Because HB Park erroneously identified DeFrancis as a respondent in the civil case information sheet on appeal, thus compelling him to file a respondent's brief, DeFrancis shall also recover his costs on appeal. (*Id.*, rule 8.278(a)(5).)

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.